Dr Kok Chee Min v Kan Choy Yoong & Ors

HIGH COURT (TAIPING) — CIVIL SUIT NO RS11-4-94(T)
ABDUL MALIK ISHAK JC
10 JUNE 1994

Civil Procedure *— Consent judgment — Stay of execution — Whether majistrate had jurisdiction to make order for possession in respect of rent-controlled premises — Whether stay should be allowed pending appeal — Control of Rent Act 1966 s 16*

The respondents were co-owners of rent-controlled premises which had been leased to the appellant for 25 years. The lease was to expire on 1 September 1991 and the respondents sent the appellant a notice to quit on or before 15 November 1991. The appellant ignored the notice and continued in occupation. Subsequently, the appellant, on the advice of counsel, entered into a consent judgment with the respondents ('the consent judgment') to, inter alia, surrender vacant possession by 1 January 1994. Subsequently, however, the appellant refused to vacate the premises and the respondents obtained a writ of possession. The appellant applied for a stay of execution of the consent judgment and writ of possession but was unsuccessful. It transpired that on 21 April 1994, the appellant had vacated the controlled premises but refused to surrender it to the respondents. The respondents took possession of the premises with the assistance of the court bailiff and police. The appellant has now applied for a stay of execution of the writ of possession and consent judgment until disposal of the appeal to the High Court on the ground, inter alia, that the magistrate had no jurisdiction to make an order for vacant possession in the consent judgment because of the provisions of s 16 of the Control of Rent Act 1966 ('the CRA').

Held, dismissing the appellant's application:

(1) The appellant must have been advised by his counsel to enter into the consent judgment. It is now not open to him to allege that the consent judgment is contrary to s 16 of the CRA and that the magistrate had made a mistake. The mistake lay with counsel who negligently advised the appellant to enter into the consent judgment. The appellant's remedy is against the negligent counsel and not against the magistrate. The consent judgment must nevertheless be obeyed.

(2) The court has an absolute and unfettered discretion in deciding whether to grant or refuse a stay. The court will not deprive a successful party of the fruits of his litigation until an appeal is determined, unless the unsuccessful party can show special circumstances to justify it. Grounds affecting correctness of the consent judgment are not special circumstances.

(3) As the appellant had already vacated the controlled premises, an order to stay execution would be completely academic and an exercise in futility.

[Bahasa Malaysia summary

Responden adalah tuan punya bersama premis sewa terkawal yang telah dipajak kepada perayu bagi tempoh 25 tahun. Pajakan itu akan tamat pada 1 September 1991 dan responden telah menghantar kepada perayu suatu notis keluar pada atau sebelum 15 November 1991. Perayu tidak mengendahkan notis itu dan terus menduduki premis itu. Kemudiannya, perayu, atas nasihat peguambelanya, telah mencatatkan suatu penghakiman persetujuan dengan responden ('penghakiman persetujuan itu') untuk, antara lain, menyerahkan milikan kosong premis itu sebelum 1 Januari 1994. Tetapi kemudiannya, perayu enggan mengosongkan premis itu dan responden telah mendapatkan suatu writ pemilikan. Perayu telah memohon untuk suatu penggantungan pelaksanaan penghakiman persetujuan dan writ pemilikan itu tetapi tidak berjaya. Kemudiannya diketahui bahawa pada 21 April 1994, perayu telah mengosongkan premis terkawal itu tetapi enggan menyerahkannya kepada responden. Responden telah mengambil milikan premis itu dengan bantuan bailif mahkamah dan pihak polis. Perayu sekarang telah memohon untuk suatu penggantungan pelaksanaan writ pemilikan dan penghakiman persetujuan itu sehingga keputusan rayuan ke Mahkamah Tinggi atas alasan, antara lain, bahawa majistret tidak mempunyai bidang kuasa untuk membuat suatu perintah milikan kosong di dalam penghakiman persetujuan itu memandangkan peruntukan Akta Kawalan Sewa 1966 ('AKS itu').

Diputuskan, menolak permohonan perayu itu:

(1) Perayu tentu telah dinasihatkan oleh peguambelanya untuk mencatatkan penghakiman persetujuan itu. Beliau sekarang tidak boleh mengatakan bahawa penghakiman persetujuan itu bertentangan dengan s 16 AKS itu dan bahawa majistret telah membuat kesilapan. Kesilapan itu telah dibuat oleh peguambela perayu yang telah menasihatkan beliau dengan cuai supaya mencatatkan penghakiman persetujuan itu. Remedi perayu adalah terhadap peguambelanya yang cuai dan bukan terhadap majistret. Penghakiman persetujuan itu bagaimanapun mesti dipatuhi.

(2) Mahkamah mempunyai budi bicara yang mutlak dan tidak terhad apabila membuat keputusan sama ada hendak membenarkan suatu penggantungan ataupun tidak. Mahkamah tidak akan merampas hasil litigasi sesuatu pihak yang berjaya sehingga rayuannya diputuskan, kecuali jika pihak yang tidak berjaya itu dapat menunjukkan keadaan khas untuk menjustifikasikannya berbuat demikian. Alasan yang mencabar ketepatan penghakiman persetujuan itu tidak merupakan keadaan khas.

(3) Oleh kerana perayu telahpun mengosongkan premis terkawal itu, jika suatu penggantungan diperintahkan ia hanya menjadi suatu perkara akademik dan usaha yang sia-sia.]

Cases referred to

Atkins v GW Ry (1886) 2 TLR 400 (folld)
Barton v Fincham [1921] 2 KB 291 (distd)
Hj Mohamed Zebedi bin Hj Salleh & Anor v Dato' Hj Abdullah bin Mohd Hussin & Ors (Dewan Perniagaan dan Perusahaan Melayu Malaysia, Intervenor) [1994] 1 CLJ 70 (folld)
Hoo Hua v Lee Hin & Ors [1985] 1 MLJ 149 (refd)
Leong Poh Shee v Ng Kat Chong [1966] 1 MLJ 86 (folld)
Lim Kim Chuan v Hari Singh [1981] 1 MLJ 241 (distd)
Monk v Bartram [1891] 1 QB 346 (folld)
S Pakianathan v RK Stallard [1979] 2 MLJ 251 (refd)
Serangoon Garden Estate Ltd v Ang Keng [1953] MLJ 116 (folld)
Wee Choo Keong v MBf Holdings Bhd & Anor & another appeal [1993] 2 MLJ 217; [1993] 3 CLJ 210 (folld)

Legislation referred to

Control of Rent Act 1966 s 16
Subordinate Courts Rules 1980 O 26A r 2, Form 75

Ng Man Kit (MK Ng & Associates) for the appellant.
Ng Poh Tat (Ng Poh Tat & Co) for the respondents.

Abdul Malik Ishak JC: The respondents were co-owners of controlled premises located at No 23, Main Road, Sungai Siput North ('the controlled premises'). On 16 August 1966, the respondents leased the controlled premises to the appellant for a period of 25 years and that lease was scheduled to expire on 1 September 1991. By letter dated 9 August 1991, the respondents through their solicitors sent a notice to quit to the appellant, to be effective on or before 15 November 1991 — thus giving the appellant ample time to vacate the controlled premises. As expected, the appellant ignored the notice to quit and continued to be in occupation of the controlled premises. The appellant, a medical doctor, had set up a clinic under the style of 'Kok Clinic' at the controlled premises and refused to budge citing, inter alia, the reasons that: 'saya telah menduduki premis itu untuk selama nyaris-nyaris 30 tahun sehingga kini dan premis ini mempunyai nilai sentimental kepada saya' (see encl 3A, para 6). Undaunted, the respondents applied in the magistrates' court, Sungai Siput North, Perak by way of notice of application under O 26A r 2 of the Subordinate Courts Rules 1980 ('the SCR') for vacant possession, mense profits at the rate of RM104 per month from 2 September 1991 till the date of the surrender of vacant possession of the controlled premises and costs, which application was supported by an affidavit affirmed by the first respondent on 24 June 1992 on behalf of herself and the rest of the respondents; which affidavit verified the facts on which the application was based in compliance

A with the format in Form 75A of the SCR. The appellant, on being advised by his counsel, entered into a consent judgment with the respondents dated 27 November 1992 ('the consent judgment'). There were three parts of the consent judgment as recorded by the learned magistrate:

The first part of the consent judgment reads thus:

B

> Dengan persetujuan adalah diperintah pada hari ini bahawa defendan dan semua orang yang menduduki premis No 23, Main Road, Sungai Siput Utara, Perak melalui defendan menyerahkan milik kosong tersebut kepada plaintif selewat-lewatnya pada 1 Januari 1994.

The second part of the consent judgment reads thus:

C

> Dengan persetujuan adalah selanjutnya diperintahkan pada hari ini bahawa defendan membayar kepada plaintif hasil tanah dan hasil taksiran (cukai pintu) bagi tahun 1992 berjumlah RM873 dan bagi tahun 1993 yang berjumlah RM873 apabila dikehendaki pada waktu yang ditetapkan oleh pihak berkuasa yang berkenaan.

D The third part of the consent judgment reads thus:

> Dengan persetujuan adalah juga diperintahkan bahawa defendan membayar kepada plaintif wang sewa ke atas premis tersebut berjumlah RM780 yang merupakan tunggakan sewa bulanan dari bulan September 1991 hingga November 1992 dan seterusnya wang sewa bulanan sebanyak RM52 mulai bulan Disember 1992 sehingga bulan Disember 1993.

E

The appellant fulfilled his obligations under the second and third parts of the consent judgment (see exhs K3 and K4 of encl 9) but refused to obey the first part of the consent judgment and continued to remain in the controlled premises. On 7 February 1994, the appellant applied by way of a notice of application ('the first application') to the magistrate, Sungai F Siput North, Perak for stay of execution of the consent judgment till 31 March 1994 supported by an undated affidavit of the appellant wherein the appellant requested for time to enable him to move his clinic to a new premise at No 118, Jalan Besar, 31100 Sungai Siput, Perak ('No 118, Jalan Besar'). On 21 April 1994, the learned magistrate after hearing the G submissions of both parties dismissed the first application with costs. It transpired that on 21 April 1994, the appellant vacated the controlled premises (see photographs at exh K10 in encl 9) and occupied the premises at No 118, Jalan Besar and there he carried on his medical practice. The appellant, however, displayed his stubbornness and refused to surrender the keys of the controlled premises to the respondents and, consequently, H he also refused to surrender vacant possession to the respondents.

This prompted the respondents to obtain leave of the magistrates' court, Sungai Siput North for a writ of possession to be issued to enforce the consent judgment and such leave was obtained on 21 April 1994.

I Meantime, the appellant filed an application ('the second application') in the magistrates' court, Sungai Siput North, Perak to stay executions of not only the order dated 21 April 1994 for the first application but also the consent judgment. The learned magistrate dismissed the second application on 27 May 1994. In due course, the respondents entered the controlled

premises and took possession of it with the assistance of the court bailiff and the police from Sungai Siput North police station on 27 May 1994 — by that time the appellant had stopped operating his clinic at the controlled premises and from the photographs at K10 in encl 9, it can be surmised that the appellant was in the process of vacating the controlled premises. It was at this time that the appellant surrendered the keys to the controlled premises to the respondents.

The appellant now applies by way of a summons in chambers (encl 3) to stay, firstly, the order of the learned magistrate dated 21 April 1994 and, secondly, the consent judgment until disposal of the appeal before the High Court, Taiping, Perak.

Several grounds were put forward for stay of execution. It was averred in the affidavit of the appellant in encl 3A that the solicitors were directed to lodge appeals against the orders of the learned magistrate, Sungai Siput North for the reasons that the magistrate had no jurisdiction to give those orders. This ground seems to be grounded on the argument that the consent judgment was a nullity on the ground that the learned magistrate had no jurisdiction to make an order for vacant possession (the first part of the consent judgment) because of the provisions of the Control of Rent Act 1966 ('the CRA'). Counsel for the appellant relied on the English case of *Barton v Fincham* [1921] 2 KB 291 where Bankes LJ construed s 5 of the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 to the effect that the jurisdiction of the court to make an order for possession must be restricted to instances specified in the section and to no others. This is what Bankes LJ said [at p 295]:

> In the case of the restriction on the right to possession s 5 provides as follows: 'No order or judgment for the recovery of possession of any dwelling house to which this Act applies, or for the ejectment of a tenant therefrom, shall be made or given unless ...' Then follows in a series of subsections a list of the instances in which an order or judgment may be made or given. It appears to me that the legislature in reference to claims for possession has secured its object by placing the fetter, not upon the landlord's action, but upon the action of the court. The language used is so clear and precise that there is in my opinion no room for cutting down or restricting the operation of the section. The legislature has definitely declared that the court shall exercise its jurisdiction only in the instances specified in the section, and in no others.

In another part of his judgment, his Lordship said [at p 296]:

> In my opinion s 5 is an instance of a case where the legislature has in clear and unmistakable language restricted the jurisdiction of the court, and where no agreement between parties can give the court a jurisdiction which the legislature has said it is not to exercise.

The English s 5 of the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 found its equivalent in our s 16 of the CRA and Chang Min Tat FJ (as he then was) had occasion to deal with s 16 of the CRA in the case of *Lim Kim Chuan v Hari Singh* [1981] 1 MLJ 241. Speaking for the Federal Court, his Lordship had this to say:

A The premises are controlled premises and come under the provisions of the Control of Rent Act No 56 of 1966. Section 16 restricts the common law rights of a landlord to possession except under any of the cases in (a) to (m). Before any landlord can hope to recover possession of his controlled premises he must therefore be able to bring his claim within one of these listed cases.

B The facts in *Barton v Fincham* were that the defendant, Mrs Fincham, was and had been for 12 years the tenant of a house to which the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 applied, and had paid her rent monthly. The plaintiff bought the house subject to the tenancy. He desired to sell the house with vacant possession. He therefore made an agreement with the defendant that she in consideration of £20 should give C him notice to quit, and should peaceably yield up possession at Michaelmas 1920. The agreement was in writing dated 22 July 1920 and signed by the defendant; the £20 was duly paid by the plaintiff, and notice to quit was duly given by the defendant. When Michaelmas arrived the defendant refused to give up possession, but she did not repay or tender the £20. The D plaintiff then brought an action in the county court to recover possession of the house and mesne profits.

The facts in *Lim Kim Chuan v Hari Singh* were that the respondent had let certain premises to the appellant. The premises were rent-controlled and the rent was RM50 a month. The respondent sought to increase the rent to RM125 a month but the respondent did not agree and there was no E agreement in writing. The respondent claimed possession on the ground that rents at RM125 a month were in arrears.

Clearly therefore the facts in both these cases are poles apart from the present case. In the present case, the lease of 25 years standing was scheduled to expire on 1 September 1991, and by letter dated 9 August F 1991, the respondents sent a notice to quit to the appellant. The respondents further sought the aid of the magistrates' court at Sungai Siput North by filing an application under O 26A r 2 of the SCR to obtain vacant possession, mesne profits and costs, and arising out of this both parties entered into a consent judgment on 27 November 1992. Till today that consent judgment still remains in its original form. No attempt was made G by the appellant to challenge the consent judgment like what was done in *S Pakianathan v RK Stallard* [1979] 2 MLJ 251, where the Federal Court set aside a consent order on the ground that the consent given by the solicitor was without the authority of the party. In the present case, the appellant is a doctor by profession, an educated person and not an illiterate, H he must have been advised by his counsel to enter into the consent judgment and it is now not open to him to allege that the consent judgment, in particular the first part, is against s 16 of the CRA. His counsel must have advised him before recording the consent judgment before the learned magistrate. The learned magistrate cannot be made to be a fool for recording the consent judgment for he was merely performing I his judicial function. The learned magistrate did not make any mistake — that mistake lies with the counsel who so negligently advised the appellant to enter into the consent judgment. In the present case: 'There was no error in expressing the intention of the court when the consent order was

drawn up. Everything was laid on the table,' (see *Hj Mohamed Zebedi bin Hj Salleh & Anor v Dato' Hj Abdullah bin Mohd Hussin & Ors (Dewan Perniagaan dan Perusahaan Melayu Malaysia, Intervenor)* [1994] 1 CLJ 70). The appellant's remedy is against the negligent counsel and not to take a cudgel against the learned magistrate. From the recital of the facts, the appellant took time to obey the consent judgment. That the consent judgment must be obeyed is now beyond question. The Lord President in the recent case of *Wee Choo Keong v MBf Holdings Bhd & Anor & another appeal* [1993] 2 MLJ 217 at pp 220–221; [1993] 3 CLJ 210 at p 212 had this to say on the question of obedience to a court order:

> It is established law that a person against whom an order of court has been issued is duty bound to obey that order until it is set aside. It is not open for him to decide for himself whether the order was wrongly issued and therefore does not require obedience. His duty is one of obedience until such time as the order may be set aside or varied. Any person who fails to obey an order of court runs the risk of being held in contempt with all its attendant consequences.

That sums up the precarious position of the appellant had he persisted in ignoring the consent judgment.

Next, it was also averred in the affidavit of the appellant in encl 3A that there were merits or strong grounds for an appeal and that there were grounds affecting the validity or correctness of the consent judgment and, consequently, a stay for execution should be granted.

It is now established that the court has an absolute and unfettered discretion in deciding whether to grant or refuse a stay. And that an application for a stay must always be supported by an affidavit of special circumstances (*Leong Poh Shee v Ng Kat Chong* [1966] 1 MLJ 86). It is further established by a long line of authorities that the court will not deprive a successful party of the fruits of his litigation until an appeal is determined, unless the unsuccessful party can show special circumstances to justify it (see for instance, *Serangoon Garden Estate Ltd v Ang Keng* [1953] MLJ 116).

16 *Halsbury's Laws of England* (3rd Ed) at p 35 states:

> The court has an absolute and unfettered discretion as to the granting or refusing of a stay, and as to the terms upon which it will grant it, and will, as a rule, only grant it if there are special circumstances, which must be deposed to on affidavit unless the application is made at the hearing.

See also *Monk v Bartram* [1891] 1 QB 346 which echoes the same principle.

But the power of the court to stay is limited in its scope. This is supported by a passage appearing in 17 *Halsbury's Laws of England* (4th Ed) para 451 at p 270:

> ... the court's inherent jurisdiction to stay the execution of a judgment or order is limited in its extent, and can only be exercised on grounds that are relevant to a stay of the enforcement proceedings themselves, and not to

matters which may operate as a defence in law or relief in equity, for such matters must be specifically raised by way of defence in the action itself.

Thus, grounds affecting the validity or correctness of the consent judgment are not special circumstances. This is because, as was said by Lord Esher MR in *Atkins v GW Ry* (1886) 2 TLR 400: 'strong grounds for an appeal is no reason for a stay of execution, for no one ought to appeal without strong grounds for doing so.' In my judgment, neither merits or strong grounds for an appeal nor the validity or correctness of the judgment appealed from are special circumstances which would entitle the appellant a stay of execution.

There is another point that needs mention. It is this. The appellant had already vacated the controlled premises and therefore an order to stay execution would be completely academic (*Hoo Hua v Lee Hin & Ors* [1985] 1 MLJ 149) and, if I may add, an exercise in futility.

For the reasons adumbrated above, the application for a stay of execution was therefore dismissed with costs.

Application dismissed.

Reported by Anne Khoo